Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand	)	
Proceedings: Bell Operating Company	)	CC Docket No. 95-20
Provision of Enhanced Services	)	
	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of *Computer III* and ONA	)	CC Docket No. 98-10
Safeguards and Requirements	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

Frank W. Krogh
Mary L. Brown
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2372

Dated: March 27, 1998

TABLE OF CONTENTS

Introduction 1

I. THE COST-BENEFIT ANALYSIS IN THE FURTHER NOTICE

A. The Telecommunications/Information Service Dichotomy 11
B. The Further Notice 13

II. THE BOCS CANNOT DEMONSTRATE ANY SIGNIFICANT BENEFITS FROM STRUCTURAL INTEGRATION 22

A. The BOCs Cannot Show Significant Benefits to Their Information Services From Structural Integration23

B. The BOCs Cannot Demonstrate Public Benefits Resulting From Structural Integration That Could Not Also Occur Under Structural Separation . . 31

C. Elimination of Structural Separation is Not Necessary for "One-Stop Shopping" for BOC Local and Information Services 41

III. THE ANTICONSUMER AND ANTICOMPETITIVE COSTS OF STRUCTURAL INTEGRATION HAVE INCREASED SIGNIFICANTLY SINCE THE COMPUTER iii REMAND PROCEEDING 44

A. Introduction 44

B. ONA, Section 251 Unbundling, the Antidiscrimination Regulations and Other Factors Discussed in the Further Notice Are Not Sufficient to Control Discrimination and Other Anticompetitive Conduct by the BOCs 47

1. The Inadequacy of CEI 47

2. The Unfulfilled Promise of ONA 49

3. The Continuing BOC Abuse 52

4. Section 251 Unbundling Has Not Achieved the Antidiscrimination Goals of ONA 54

5. Nonstructural Safeguards Are Inadequate to Prevent BOC Discrimination Against Other ISPs 57

C. The Cost Accounting Rules Do Not Prevent Cost-Subsidies 59

IV. THE COMMISSION SHOULD UNDERTAKE ADDITIONAL UNBUNDLING AND OTHER STEPS TO COMBAT DISCRIMINATION 64

A. The Unbundling Obligations in Section 251 Should be Enforced by Prohibiting ILECs' Use of UNEs Not Made Available to Other Carriers . . 65

B. ONA Must Be Made to Work 66

C. The Commission Should Require the Unbundling That is Necessary for the Emerging Broadband Packet-Switched Services 68

D. Section 251 Should be Enforced, Not Artificially Extended to Cover ISPs 69

CONCLUSION 71

SUMMARY

The Commission has twice decided to eliminate the Computer II structural separation requirements governing BOC provision of local and intraLATA information services and to replace them with nonstructural safeguards. The U.S. Court of Appeals for the Ninth Circuit twice reversed and remanded those proceedings back to the Commission, holding in California I and California III that the Commission had failed to rationally weigh the regulatory and competitive costs and benefits of such relief. The court in California III explained that the Commission's original vision of ONA "still has not been achieved." Since the CEI rules along with the other antidiscrimination regulations are not adequate to prevent access discrimination "without fully implemented ONA ... [t]he FCC has not explained adequately how its diluted version of ONA will prevent this behavior."

Under the Commission's reading of California III, a BOC may still offer any information service jointly with its regulated services simply by obtaining approval of a CEI plan covering such service. By thus assuming that California III upheld most of the structural relief granted in the Computer III Remand Order, the Commission starts this proceeding with integrated BOC information services as a given, thereby framing the main policy choice incorrectly. By vacating the structural relief in the Computer III Remand Order, California III actually reimposed the Computer II structural separation regime, which has been only temporarily

waived pending resolution of this proceeding. The policy choice facing the Commission thus is whether the alleged economic and other benefits of eliminating the structural separation requirement outweigh the competitive and ratepayer risks in doing so.

Not only is ONA as inadequate and undeveloped as it was when California III was decided, but it has also become clear that most independent ISPs cannot afford the basic service elements (BSEs) that must be purchased as part of any useful ONA package, making ONA both useless and too expensive.

Other factors tilt this cost-benefit analysis even more in favor of continuation of structural separation. The costs of moving from joint provision of telecommunications and information services to structural separation may not be considered, since the status quo is structural separation. Also, once a BOC sets up a separate affiliate to offer its interLATA information services under Section 272 of the Communications Act, there will be little additional cost in offering all remaining information services through the same affiliate.

The competitive and ratepayer risks of BOC joint telecommunications and information services are greater than the BOCs have represented in their comments. MCI technical experts detailed the BOCs' obstructionism in industry standards fora, resulting in delays in the development of the network unbundling

required for the development of ONA. Anticompetitive conduct under approved CEI plans demonstrates that CEI, even in conjunction with all of the other antidiscrimination rules -- nondiscrimination reports, network information disclosure rules and customer proprietary network information rules -- is worthless as a substitute safeguard.

MCI also wishes to bring to the Commission's attention fresh evidence of continuing BOC anticompetitive abuses. Bell Atlantic is providing an information service on an unseparated basis without having filed a CEI plan, as required by Computer III. Bell Atlantic is depriving its competitors of the monopoly facilities, services and information used in the provision of its own information service.

Price cap regulation and cost allocation and other accounting rules have not been effective in inhibiting cross-subsidization. As long as access charges remain far above actual costs, there will continue to be a vast funding pool available to subsidize BOC information services, irrespective of the fact that such inflated access charges are ostensibly limited by price caps.

A rational cost-benefit analysis requires a continuation of the structural separations requirements. Without the artificial handicap created by the cross-subsidies provided by the BOCs to their own information services, ISPs would be more competitive

with the BOCs. Treating all BOC information services similarly would eliminate the incentive to game the system or to configure information services simply to avoid the separation requirements of Section 272.

At the very least, the Commission should minimize the anticompetitive impact of BOC provision of information services by requiring greater unbundling under both Section 251 and ONA. If the Commission takes steps to ensure that CLECs finally are able to obtain UNEs from ILECs, ISPs will benefit by the greater choice available to them. The BOCs are undermining the unbundling requirement of Section 251 through inadequate systems for the ordering, provisioning, maintenance and repair and billing of UNEs. None of the BOCs has yet implemented nondiscriminatory access to its OSS, which is as crucial a prerequisite for Section 251 unbundling as it is for ONA.

Even under the best of circumstances, Section 251 cannot be counted on to cure the ills of ONA for other reasons as well. Section 251 does not focus on the type of logical, software-driven unbundling that ONA was supposed to provide. Essentially, the Commission needs to continue pressing the BOCs and other ILECs to open up the network both in the Section 251 context and by setting a deadline for fundamental network service ONA unbundling, since both types of unbundling are needed for the variety of information services now being provided.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	)	CC Docket No. 95-20
	)	
	)	
1998 Biennial Regulatory Review -- Review of *Computer III* and ONA Safeguards and Requirements	)	CC Docket No. 98-10

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

Introduction

MCI Telecommunications Corporation (MCI) hereby responds to the Commission's Further Notice of Proposed Rulemaking in the above-captioned dockets[1] seeking additional comments in light of the Telecommunications Act of 1996 (1996 Act).[2] MCI is vitally dependent upon the local exchange network facilities of the Bell Operating Companies (BOCs) and other incumbent local exchange carriers (ILECs). As the second largest interexchange carrier, MCI has an interest in ensuring that the rates it pays for the BOCs' regulated interstate access services -- its largest single cost -- are not artificially inflated to subsidize the BOCs' competitive, unregulated activities. As an increasingly significant provider of enhanced services (or, in the terminology of the 1996 Act, which will be used throughout, information services), MCI also has an interest in ensuring equal,

---

[1] FCC 98-8 (released January 30, 1998).

[2] Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq.

nondiscriminatory, reasonably priced access to fully unbundled basic network facilities for all information service providers (ISPs).

MCI welcomes this opportunity to discuss the issues that are crucial to a rational decision in these dockets. Since prior Commission orders in predecessor proceedings have led to two reversals, MCI believes that it would be useful to understand the defects in those orders and how the Commission can avoid another reversal, especially in light of the 1996 Act and recent BOC discrimination and other anticompetitive abuses.

As the Commission is aware, the issue before it is whether to allow the BOCs to provide local and intraLATA information services jointly with their regulated local basic services (or, under the 1996 Act, local telecommunications services), or whether to require the former to be provided through separate subsidiaries. In its prior orders in the two predecessor dockets -- the Computer III[3] and Computer III Remand[4] proceedings -- the Commission twice decided to eliminate the Computer II[5] structural

---

[3] See Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), on reconsideration, 2 FCC Rcd 3035 (1987); Phase II, 2 FCC Rcd 3072 (1987) (collectively, Computer III Orders), vacated and remanded sub nom., California v. FCC, 905 F.2d 1217 (9th Cir. 1990)(California I).

[4] See Report and Order, Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (Computer III Remand Order), partly vacated sub nom. California v. FCC, 39 F.3d 919 (9th Cir. 1994)(California III).

[5] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980), mod. on reconsideration,

separation requirement previously governing BOC provision of information services and to replace it with nonstructural safeguards. On the basis of issues raised by MCI, the U.S. Court of Appeals for the Ninth Circuit twice reversed and remanded those proceedings back to the Commission, holding in California I and California III that the Commission had failed to rationally weigh the regulatory and competitive costs and benefits of such structural relief.[6]

Most recently, in California III, the Court held that

> the FCC has ... failed to provide support or explanation for some of its material conclusions regarding prevention of access discrimination. Thus, once again, we conclude that the FCC's cost benefit analysis is flawed and set aside the Order on Remand as arbitrary and capricious under the APA.[7]

The Court explained that the Commission's original vision of Open Network Architecture (ONA) "still has not been achieved."[8] Since the Comparably Efficient Interconnection (CEI) rules, along with the other antidiscrimination regulations, are not adequate to prevent access discrimination "without fully implemented ONA," "[t]he FCC has not explained adequately how its diluted version

---

84 FCC 2d 50 (1981), mod. on further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[6] See California I, cited in n. 3, supra, and California III, cited in n. 4, supra.

[7] 39 F.3d at 930.

[8] Id. at 929.

of ONA will prevent this behavior."[9]

This reversal reimposed the Computer II structural separation regime, but for the Interim Waiver Order granted by the Common Carrier Bureau pending the outcome of the current further remand proceeding.[10] Thus, the issue presented now is whether the structural separation rules, having been revived by California III, should be eliminated. In other words, the Commission must determine whether the supposed economic and other benefits of eliminating structural separation outweigh the competitive and ratepayer risks in doing so.

In weighing the relevant costs and benefits of eliminating structural separation, the Commission now has the benefit of hindsight and the 1996 Act. The basic problem that gives rise to these issues is the BOCs' continuing local bottleneck control. It was always understood that safeguards -- structural or nonstructural -- against BOC abuses in the provision of information services would be needed until local competition developed sufficiently to diminish their incentives and abilities to discriminate and cross-subsidize.[11] At the time of Computer III, the development of local competition and eventual relaxation of the MFJ's information services restriction were a distant

---

[9] Id.

[10] Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36 (CCB released Jan. 11, 1995).

[11] See Computer III, 104 FCC 2d at 1021 n. 175.

dream. Indeed, Computer III was essentially a conditional proceeding, contingent on MFJ relief.[12] There seemed to be virtually no end in sight to the need for safeguards. Given the possible costs of structural separation over what was expected to be such a long period of time, it might have seemed reasonable to try nonstructural safeguards.

Now, there is at least a statutory mechanism for the realization of local competition, although experience so far shows that robust competition will not be quickly achieved. As will be discussed, the various vehicles for the realization of local competition in Sections 251 and 252 of the Communications Act have been stymied by a number of factors, not the least of which is ILEC resistance to such threats to their local market dominance. As the Further Notice points out, the BOCs remain the overwhelmingly dominant providers of local exchange and exchange access services in their in-region states, with about 99.1% of the local service revenues in their service territories.[13]

It has thus become clear that a necessary prerequisite for the development of local competition is regulatory incentives for the BOCs to take market-opening steps. The 1996 Act uses the carrot of the in-region long distance service authorization mechanism of Section 271, which requires compliance with various conditions necessary for the development of local competition,

---

[12] See Computer III, 104 FCC 2d at 1021 n. 174.

[13] Further Notice at ¶ 51 & n. 151.

including nondiscriminatory access to unbundled network elements in accordance with Sections 251 and 252.

At the same time, Congress endorsed structural separation in Section 272 as the most appropriate means of restraining BOC discrimination and cross-subsidization in the provision of interLATA information services, even after a BOC has met the Section 271 checklist and other requirements. In other words, Congress found that the benefits of structural separation for ratepayers and interLATA information service competition outweigh its costs. There does not appear to be any reason to expect that the cost-benefit balance should be any different for local and intraLATA information services.

In this context, the Commission should be more willing than it has been in the past to retain structural separation for the transition to full local competition. The BOCs, more than ever before, hold the key to removal of structural separation and restrictions under the 1996 Act by opening their local markets to competition through unbundling and other means. Given Congress' balancing in Section 272 in favor of structural separation and the BOCs' new power to get out from under structural separation, the alleged costs of structural separation that might be incurred during the remainder of the transition to local competition are outweighed to an even greater extent than they were in the 1980's by the continuing ratepayer and competitive risks from its elimination, in light of the BOCs' continuing local dominance.

Other factors tip the balance even more in favor of continuation of structural separation. Not only is ONA as inadequate and undeveloped as it was when California III was decided, but it has also become clear that most independent ISPs cannot afford the basic service elements (BSEs) that must be purchased as part of any useful ONA package, making ONA unaffordable as well as useless.

Additional factors tilt this cost-benefit analysis even more in favor of continuation of structural separation. In the past, prior to passage of the 1996 Act, the BOCs argued that the costs of setting up a separate subsidiary and the one-time costs of moving their information services to the subsidiary weighed significantly against structural separation.[14] Those costs, as well as a large part of the additional ongoing costs of providing information services through a separate subsidiary, should not be considered, however, for two reasons. First, as explained in more detail below, since the reversal of the Computer III Remand Order in California III returned the industry to the Computer II structural separation regime, but for the Interim Waiver Order, the costs of moving from joint provision of telecommunications and information services to structural separation may not be considered. Since the BOCs would now be governed by the Computer II structural separation rules were it not for the interim waiver

---

[14] See, e.g., Pacific Bell Comments at 71-76, CC Docket No. 95-20 (April 7, 1995).

pending the resolution of this proceeding, structural separation must be considered the status quo in making any rational cost-benefit analysis. Otherwise, the Commission will have allowed the BOCs to bootstrap permanent relief in this proceeding from the interim waiver.

Moreover, as also explained below, once a BOC sets up a separate affiliate to offer its interLATA information services under Section 272 of the Communications Act, there will be little additional cost in offering all remaining information services through the same affiliate, thereby removing the main cost of separation previously cited by the BOCs.[15] The BOCs have not provided a detailed analysis of the incremental costs involved in providing all of their information services on a separated basis in light of the separation already required by Section 272 for their interLATA information services. The final factor negating the BOCs' showings of costs arising from structural separation is that, under structural separation, the information services subsidiary could resell the BOC's local services together with its own information services and market them jointly, as long as

---

[15] The BOCs have been granted forbearance from the application of the separation and nondiscrimination requirements of Section 272 for at least some of their interLATA information services in Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, CC Docket No. 96-149, DA 98-220 (released Feb. 6, 1998). As will be discussed, however, Bell Atlantic appears to be providing a reverse search directory assistance information service in New Jersey on an interLATA basis without the benefit of any such forbearance order or application.

the local services were available to all other ISPs on a nondiscriminatory basis.

Furthermore, as will also be explained in more detail, the competitive and ratepayer risks of BOC joint telecommunications and information services are greater than the BOCs have represented in their previous filings. For example, Bell Atlantic has been providing an information service on an unseparated basis without having filed a CEI plan, as required by Computer III. As discussed below, its provision of such service violates the CEI and Computer III nondiscrimination rules, as well as Section 251(c)(3) of the Communications Act, in various ways, depriving its competitors of the monopoly network elements, facilities, services and information used in the provision of its own information services. This anticompetitive conduct reinforces the need to retain the structural separation requirement of Computer II. Neither Section 251 unbundling nor ONA will develop to the point where they can be effective deterrents to discrimination anytime in the foreseeable future.

As also explained below, price cap regulation and cost allocation and other accounting rules have not been effective in inhibiting cross-subsidization. As long as access charges remain far above actual costs, there will continue to be a vast funding pool available to subsidize BOC information services, irrespective of the fact that such inflated access charges are ostensibly limited by price caps.

Thus, a rational cost-benefit analysis requires a continuation of the structural separation requirement. Structural separation cannot be shown to cause significant incremental costs to the BOCs, and certainly not to the public, and the risks to ratepayers and to competition from the elimination of structural separation are just as great as they ever were, if not greater, given the inadequacy of ONA and continuing anticompetitive behavior and problems with cross-subsidization. Finally, treating all BOC information services similarly would eliminate the incentive to game the system or to configure information services simply to avoid the separation requirement of Section 272, freeing Commission resources for other, more pressing tasks. Thus, continuation of the structural separation requirement would result in multiple benefits for ratepayers, consumers, competition and the Commission.

At the very least, whether or not the Commission decides to retain structural separation, the Commission should minimize the anticompetitive impact of BOC provision of information services by continuing the implementation of the Section 251 unbundling requirements begun in the Local Competition Order[16] and by

---

[16] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), vacated in part on reh'g sub nom. Iowa Utilities Bd. v. FCC, 120 F.3d 753, further vacated in part sub nom. California Public Utilities Comm'n v. FCC, 124 F.3d 934, writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir. Jan. 22, 1998), petition for cert. granted,

imposing stringent deadlines on the unfinished business of ONA unbundling. Neither Section 251 unbundling nor ONA has been developed to the point where they should be, and MCI explains below the further network unbundling that is necessary to create a level playing field in information services.

I. THE COST-BENEFIT ANALYSIS IN THE FURTHER NOTICE

A. The Telecommunications/Information Service Dichotomy

Before turning to the cost-benefit framework set forth in the Further Notice, MCI, as a preliminary matter, agrees with the Commission that the term "telecommunications services" in the 1996 Act may be read as equivalent to the term "basic services" in its Computer Inquiry proceedings and accompanying rules, with the exceptions that have been previously discussed in prior proceedings implementing the 1996 Act, none of which are relevant here. In the Non-Accounting Safeguards Order,[17] the Commission

---

Nos. 97-826, et al. (U.S. Jan. 26, 1998)(subsequent history omitted).

[17] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, (1996)("Non-Accounting Safeguards Order"), Order on Reconsideration, 12 FCC Rcd 2297 (1997); Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), aff'd sub nom. Bell Atlantic v. FCC, No. 97-1432 (D.C. Cir. Dec. 23, 1997); petition for review pending sub nom. SBC Communications v. FCC, No 97-1118 (D.C. Cir. filed March 6, 1997) (held in abeyance pursuant to court order issued May 7, 1997).

The Commission pointed out in the Non-Accounting Safeguards

found that all of the services that had been considered "enhanced" under the Computer Inquiry rubric should be treated as "information" services under the 1996 Act. In discussing these issues, therefore, MCI will use the "telecommunications/ information" dichotomy instead of the "basic/enhanced" distinction.

In discussing the issue of terminology, the Commission also raises a question as to whether the Computer II rule requiring facilities-based carriers that provide "enhanced" services to unbundle their "basic" services and offer such services to other enhanced service providers should be updated to refer to telecommunications and information services.[18] MCI notes that the issue of unbundling basic, or telecommunications, services from CPE and from enhanced, or information, services is going to be addressed in a proceeding focusing exclusively on the bundling rules.[19] MCI suggests that the issue of whether or not all carriers should unbundle the telecommunications services they use to provide their information services and offer those

---

Order that the term "telemessaging services" in the 1996 Act, which falls within the category of "information services," includes certain live operator messaging services. Id. at ¶ 145. To the extent that such services might have been considered basic services under the Computer Inquiry nomenclature, they constitute one type of basic service that is not treated as a telecommunications service under the 1996 Act.

[18] Further Notice at ¶ 42.

[19] FCC Staff Proposes 31 Proceedings as Part of 1998 Biennial Regulatory Review, Report No. GN 98-1 (released Feb. 5, 1998)(includes item on Part 64 bundling rules).

telecommunications services to others under tariff should be addressed in the forthcoming review of the bundling rules.

For now, it is sufficient to state that, given the intense competition in long distance services and MCI's and other CLECs' lack of market power in local exchange and toll services, there is no longer any need to require such unbundling for nondominant carriers. The original rationale for the rules against bundling was that carriers should not be permitted to leverage their market power in regulated services so as to affect adversely competition the nascent CPE and enhanced services markets.[20] Now, alternative sources for nondominant carriers' telecommunications services are so readily available at competitive rates that there is no longer any need to require that such services always be unbundled from information services.

B. The Further Notice

In establishing the framework of the cost-benefit analysis that must be performed, the Commission sets forth as its goals the promoting of innovation in the provision of information services and the prevention of access discrimination and cross subsidization.[21] The Commission recites the history of the

---

[20] See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384, 423-35 (1980), mod. on reconsideration, 84 FCC 2d 50 (1981), mod. on further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[21] Further Notice at ¶ 43.

Computer II structural separation requirement and acknowledges that such separation

> reduces firms' ability to engage in anticompetitive activity without detection because the extent of joint and common costs between affiliated firms is reduced, transactions must take place across corporate boundaries, and the rates, terms, and conditions on which services will be available to all potential purchasers must be made publicly available. Structural separation thus is useful as an enforcement tool and as a deterrent....[22]

In Computer III, the Commission nevertheless found that the benefits of nonstructural safeguards are significantly greater than the benefits of structural separation, in light of marketplace, regulatory and technological developments since Computer II, and that structural separation imposes much greater costs than nonstructural safeguards, in terms of the delayed introduction of new services and prevention of economies of scale. The Commission accordingly substituted, in place of structural separation, a two-phase regime of nonstructural safeguards: a service-specific CEI scheme followed by an ONA phase covering all BOC information services. Computer III was vacated by California I, in which the Ninth Circuit held that the Commission had not justified its decision to rely on nonstructural cost accounting safeguards as protection against cross-subsidization.[23]

On remand, the Commission attempted to strengthen the

---

[22] Id. at ¶ 46.

[23] See Further Notice at ¶¶ 9-12, 47.

accounting rules and reaffirmed the usefulness of all of the nonstructural safeguards in deciding once again to replace structural separation with nonstructural safeguards in the Computer III Remand Order. The Commission also began implementing its ONA requirements, upon which the Computer III Remand Order was partially based. The structural relief granted in that order was vacated again by the Ninth Circuit in California III, in which the Court found that the Commission had not explained how the reduced level of unbundling required in the ONA Orders[24] could provide sufficient protection against access discrimination so as to justify elimination of structural separation. On remand from California III, the Commission issued the Interim Waiver Order and the Computer III Further Remand Notice initiating CC Docket No. 95-20.[25]

The first major issue raised in the Further Notice is whether the unbundling that has occurred pursuant to Section 251 of the Act has alleviated the concerns discussed in California III as to the inadequacy of ONA. The Further Notice suggests that the degree of unbundling that has occurred and is occurring constitutes the fundamental unbundling that was promised for ONA

---

[24] Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988), recon., 5 FCC Rcd 3084 (1990), 5 FCC Rcd 3103 (1990), erratum, 5 FCC Rcd 4045 (1990), aff'd sub nom., California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

[25] See Further Notice at ¶¶ 12-16.

but never realized.[26] The Further Notice then tentatively concludes that, in light of the unbundling that has taken place under Section 251 and the other regulatory and market developments it cites, the Commission should continue the nonstructural safeguards now in place, rather than reimposing structural separation. The Further Notice tentatively concludes that the framework for local competition established in the 1996 Act and the effect that will have on the ability of BOCs to discriminate and cross subsidize provide additional support for the continuation of nonstructural safeguards. The Further Notice also asks what impact the separate affiliate requirement in Section 272 for BOC interLATA information services should have on its cost-benefit analysis, given that BOCs will have to establish a separate affiliate for their interLATA information services in any event.[27]

The Further Notice also asks whether ONA has been effective and, if not, how it could be made more effective. In particular, it asks whether the industry technical standards fora, such as the Network Interconnection Interoperability Forum (NIIF) have been effective in helping ISPs obtain the network services they need from the BOCs and GTE. The Further Notice seeks comment as to whether and how the Computer III and ONA rules should be modified to make them applicable to the emerging high-bandwidth

---

[26] Further Notice at ¶¶ 29-36.

[27] Id. at ¶¶ 48-59.

packet-switched data networks that increasingly characterize the information service market. It also asks whether Section 251 unbundling obviates the need for ONA and whether Section 251 unbundling rights should be extended to ISPs.[28] Finally, the Further Notice asks for comments on the petition filed by the Association of Telemessaging Services International, Inc. (ATSI) requesting that BOC joint marketing of telecommunications and information services be prohibited.[29]

The Further Notice also seeks comment on various proposals to dispense with or modify ONA reporting requirements. Because of the central importance of the structural separation and unbundling issues raised in the Further Notice, MCI is not taking a position on the reporting issues at this time but reserves the right to reply to other parties' comments on those issues.

C. The Analytical Errors in the Further Notice

In setting out the framework of the cost-benefit analysis that must be performed in this manner, the Commission continues several errors that were reflected in prior notices and orders in CC Docket No. 95-20. The main error in the Futher Notice, and one that threatens to skew the Commission's entire analysis, is the Commission's misreading of California III. The Commission reads that case as upholding most of the structural relief granted in the Computer III Remand Order, thereby still

---

[28] Id. at ¶¶ 60-96.

[29] Id. at ¶¶ 99-129.

permitting structurally integrated, or "joint", BOC local and information services pursuant to service-specific CEI plans. Under this reading, California III vacated only the final step toward full structural relief, i.e., allowing a BOC to offer any information services on an unseparated basis, once an ONA plan is approved, without having to file CEI plans.[30]

Thus, under the Commission's reading of California III, a BOC may still offer any information service jointly with its regulated services simply by obtaining approval of a CEI plan covering such service.[31] By assuming that California III upheld most of the structural relief granted in the Computer III Remand Order, the Commission starts this proceeding with integrated BOC information services as a given, thereby implicitly framing the main policy choice as a narrow one between integrated services under CEI plans and integrated services under ONA plans.

This distorted reading of California III was first expressed in the Interim Waiver Order,[32] which permits the BOCs to continue providing all of their information services pending approval of CEI plans. As MCI explained in its comments on the petition for reconsideration of the Interim Waiver Order filed by the

---

[30] Id. at ¶ 60.

[31] The Commission appears to be ambivalent about this issue, since the Further Notice also states that the Interim Waiver Order reinstated the CEI requirements. Id. at ¶¶ 16, 60.

[32] Memorandum Opinion and Order, Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36 (CCB released Jan. 11, 1995).